

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

CRIMINAL CASE NO. 20240417200001047

(Arising from Criminal Case No. 81 of 2022, Bariadi District Court)

MASANJA MADUHU @ SUTEAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

22nd May 2024

F.H. MAHIMBALI, J.

The appellant was charged and convicted of three counts of cattle theft contrary to section 265 and section 268 (1) of the Penal code, Cap 16 R.E 2022. It was alleged by the prosecution that on the 25th day of August 2022 at Ndoleji Village within Itilima District in Simiyu Region did steal a total of ten herds of cattle (four, two and four for the first, second and third counts respectively) belonging to Mr. Ilanga Sita, Kunguku Sitta and Madulu Ngunguya respectively.

The appellant disputed the charge on all three counts as particularized above. Upon full hearing, the trial court convicted the appellant and accordingly sentenced him to 15 years' jail imprisonment for each count but ordered them to run concurrently.

Not amused with the said decision, the appellant preferred this appeal armed with a total of three grounds of appeal namely:

1. That the complainant was not brought in a court to testify on the alleged allegations.
2. That the trial court erred in law and in fact to hold conviction while the people who attended to the mwano were not brought in court to produce evidence.
3. That the evidence adduced by prosecution side was not to the standard required by law, thus left a shadow of doubts.

During the hearing of appeal, the appellant stood by himself whereas the respondent who was not resisting the appeal was represented by Mr. Kadata, learned state attorney. On his part, the appellant prayed that his grounds of appeal to the petition of appeal be adopted by the court to form part of his submission. On these grounds, he pressed for his conviction be quashed and sentence set aside and ultimately be set free.

Mr. Kadata on his part, submitted that he is not opposing the appeal but based on the third ground of appeal that the prosecution's case at the trial

court had not been established to the required standard as per law, i.e proof beyond reasonable doubt. He submitted that since the prosecution's evidence mainly centered on the circumstantial on the doctrine of recent possession, for it to be legally invoked, four ingredients have to be established.

1. That the stolen property must be found with the accused person.
2. That the said property must be fully and positively identified to be that the complainant
3. That the said alleged stolen property must have been recently stolen.
4. That the stolen property must constitute the subject of the charge.

These were stated in the case of **Joseph Mkumbwa and Samson Mwakapenda v. Republic**, criminal Appeal No. 94 of 2007.

With the case at hand the complainants had not legally identified their properties positively that those were their cows. Instead, PW6 during his testimony had brought into court five cows instead of 10 in which the appellant was alleged to have stolen them. That this PW6, was not the owner of the alleged cows but just a police officer. In that regard, the 2nd ingredient was not established as the said owners had failed to positively

identified their cows. For this reason, Mr. Kadata concluded that the prosecution side failed to establish the theft allegations as per law.

So digesting the prosecution's case in totality and the grounds of appeal, the issue is, whether the prosecution's case was established beyond reasonable doubt as per law. To begin with, it is a common legal principle that in criminal law the burden of proof lies to the prosecution and the standard is beyond reasonable doubts see Section 110 and 112 read together with section 3 (2) (a) of the Evidence Act [Cap 6 RE 2019].

These two concepts were interpreted in the case of **Woodmington Vs OPP, (1935) AC 462**. In the case of **Christian Kale & Another Vs. The Republic (1992) T.L.R 302 CAT** and **John Makorobera & Another Vs. The Republic (2002) T.L.R 296**, firmly held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case and not on the weakness of the defense case.

In this case at hand the prosecution relied on circumstantial evidence to prove their case. There are numerous cases which dictate that in case where the court has to rely on circumstantial evidence the evidence to be relied upon it has to irresistibly point the accused on the guilty of the

offence charged and no one else. On other words it should not bring more than one interpretation. See the case of **Augustino Lodaru v. Republic**, Criminal Appeal No. 90 of 2013 (unreported) the Court stated that:

"We should note at the outset that it is settled law that a court of law may ground a conviction based solely on circumstantial evidence. This is so where the said evidence irresistibly led to the inference that it was the appellant and nobody else who committed the offence. Such evidence must, also, be incapable of more than one interpretation and the chain of linking such evidence must be unbroken"

See also the case of **Gabriel Simon Mnyele vs Republic**, (Criminal Appeal 437 of 2007) [2010] TZCA 97 (22 December 2010), **Justine Julius and Others vs Republic**, Criminal Appeal No. 155 of 2005 (unreported), **Simon Msoke vs Republic**, (1958) EA 715A and **John Magulandongo vs Republic**, Criminal Appeal No. 18 of 2004 (unreported).

From the mentioned cases I am settled in my mind that when a case relies on circumstantial evidence such evidence must satisfy three tests:

i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused:

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

This case relying on the doctrine of recent possession, as well stated by Mr. Kadata that four ingredients had to be established.

1. That the stolen property must be found with the accused person.
2. That the said property must be fully and positively identified to be that the complainant
3. That the said alleged stolen property must have been recently stolen.
4. That the stolen property must constitute the subject of the charge.

(see the case of **Joseph Mkumbwa and Samson Mwakapenda v. Republic**, criminal Appeal No. 94 of 2007).

In the case of **Augustino Mgimba vs Republic** (Criminal Appeal 436 of 2019) [2021] TZCA 497 (20 September 2021), while deliberating on the doctrine of recent possession, the Court of Appeal made reference to other cases such as **Abdi Julius @ Mollel Nyangusi & Another v. R**, Criminal Appeal No. 107 of 2009; **Director of Public Prosecutions v. Orestus**

Mbawala @ Bonge, Criminal Appeal No. 119 of 2019; **Mohamed Hassan Said v. R**, Criminal Appeal No. 410 of 2015; **Hassan Rashid Gomela v. R**, Criminal Appeal No. 271 of 2018 and; **Julius Mwanduka @ Shila -v. R**, Criminal Appeal No. 322 of 2016 (all unreported). In the case of **Mkumbwa Samson Mwakagenda Joseph** (supra), the Court stated thus:

*"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved, **first, that the property was found with the suspect, second, that the property is positively proved to be the property of the complainant, third, the property was recently stolen from the complainant, and lastly, that the stolen thing constitutes the subject of the charge against the accused.** The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements...."*

The question to be addressed now is whether the above stated requirements of the doctrine were met in the instant case. It is not disputed that the property alleged to have been stolen was found in possession of the appellant; it was alleged that it was recently stolen from the complainants and that it constitutes a subject matter of the charge against the appellant. What is in controversy is whether the complainants positively proved the said property to be theirs.

In digest to the prosecution's case, there is no clear direct evidence that the appellant was arrested in possession of the said cows as alleged. The alleged arresting person (Mr. Mlugu) as per PW4's testimony didn't come to court to testify on that fact whether he arrested him being in possession of the alleged cows. As to none establishment of that fact, it is legally hard to connect the appellant with the alleged charge of theft, leave alone the identification criteria used by the owners.

Furthermore, even the alleged cautioned statement (exhibit P.1) seemed to have been repudiated by the maker, yet it was freely admitted which is against the law. There ought to have been an inquiry to that effect. Thus, it is struck out from the court record for being illegally admitted.

I am also of the considered view that the said stolen cows are not clearly in description with the charge. According to the charge sheet, the appellant is alleged to have stolen cattle contrary to section 265 and 268 (1) of the Penal Code. According to subsection three of section 265 of the Penal Code, the offence says:

Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years.

Section 268 of the Penal code says:

268.-(1) Where the thing stolen is any of the animals to which this section applies the offender shall be liable to imprisonment for fifteen years.

(2) N/A.

(3) This section applies to a horse, mare, gelding, ass mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig.

Now according to the charge sheet, the appellant was charged with the offence of cattle theft. The issue for consideration is whether the offence of cattle theft is known as per law and whether well covered under the subsection three of the section 268 of the Penal Code. Perhaps it is important to ask, what is cattle? According to the charging section the

animals in reference that are capable of being stolen are listed as *horse, mare, gelding, ass mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig*. Thus, by charging cattle theft, it was not legally connoting cows as per evidence received. I say so because, the definition of cattle is not strictly meaning cow, but a broader meaning. According to the Cambridge English Dictionary, the word cattle is defined as a group of animals that includes cows, buffalo, and bison that are often kept for their milk or meat. Thus, the charging section ought to have clearly said as what an animal was that or in its particulars of offence.

So, legally speaking, there was no close link between what was charged and established in court. In **Julius Mwanduka @ Shila** (supra), faced with the issue of the identity of the stolen property by the complainant, the Court stated as follows:

"In the first place, while we agree that each mobile hand set has a unique number, there was no link between PW1 and the allegedly recovered handset We so hold on the ground, conceded by Mr. Daudi, that there is no evidence that PW1 mentioned the unique number of the phone when he reported the incident to the Police, Indeed, it seems mentioning to the Police serial numbers of the

phones would have been a tall order for him as it is on record that sixty-four handsets were stolen in that fateful evening from his shop...."

Similarly, in the case of **Mohamed Hassan Said** (supra), the Court had this to say:

"The possession by the appellant of the property proved to have been very recently stolen may support the charge. But in order for the principle to apply, the one who claimed ownership of that property, must show through evidence that the property belonged to him."

Additionally, what PW1, PW2 and PW3 had testified did not prove that they had seen the appellant with the said stolen cows and whether the alleged stolen cows were actually theirs and no one else. As the one who alleged to have arrested the appellant with the said cows didn't not testify, all that stated by PW4 and PW5 was not capable of establishing the charged offence of cattle theft.

Now, since the said cows which were not the subject matter of the charge against the appellant upon which he was convicted, I find no any good basis to hold the appellant responsible of the alleged offences after I have pointed all those pregnant issues.

I thus find the appeal with merit and accordingly allow it, quash the conviction and set aside the sentence meted out against the appellant. I finally order the release of the appellant from custody unless his continued incarceration is in relation to other lawful cause.

It is so ordered.

DATED at SHINYANGA this 22nd day of May 2024.



F.H. MAHIMBALI

JUDGE

